No. 14498

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,
Husband and Wife, and PACIFIC FRUIT EXPRESS
COMPANY, a Corporation,

Appellees.

Brief of Appellees

On appeal from the United States District Court for the
District of Idaho

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STATEMENT OF FACTS

Counsel for Appellees believe that a further statement of facts, and an explanation of the record at this point will assist the Appellate Court and be an aid in consideration of the record.

The Appellees, the Johnsons, in bringing this action were obliged to plead that by reason of the incompetency of LaVerl Johnson, he was under a legal disability and by reason of this disability was excused from bringing his action within the time limit under the Statute of Limitations in the State of Idaho (Tr. p. 7).

The Appellant denied the allegations of the Complaint in this respect, and pleaded affirmatively the Statute of Limitations (Tr. p. 11). The trial Court directed that Appellees first

meet this issue, stating that upon the pleadings alone, it appeared that the action was barred by the statute, and that unless Appellees could overcome this, it would be useless to proceed with the case on its merits.

The portion of the record, Tr. p. 43-110, deals with the physicial and mental condition of Johnson and the extent of his injuries. At that stage in the proceedings, Tr. p. 110-113, the Appellant waived and withdrew its defense of the Statute of Limitations, and only such portion of the proceedings and of the testimony up to that point remain in the record as have to do with the extent of the injuries and damages to LaVerl Johnson.

It will therefore be seen that the testimony as to the negligence of the Appellant and as to the theory of both Appellees and Appellant on the question of the liability of Appellant commence with the record on page 113 of the Transcript, and it is hoped and believed that this explanation will assist in understanding the record and appreciating the progress of the trial.

While the caption of the Transcript of the record and of the Brief of the Appellant refer to Pacific Fruit Express Company, a Corporation, as one of the Appellees, this Company is not an Appellee in any sense, and all reference to Appellees in the Brief of both parties, refer to LaVerl Johnson and Joleen Johnson.

The appellee, LaVerl Johnson, was seriously injured on November 4, 1950 by coming in contact with 12,500 volts of electricity while working as an employee for the Pacific

Fruit Express Company in Pocatello, Idaho (Tr. p. 44-45). At the time of the injuries, LaVerl Johnson was 23 years of age, married to Joleen Johnson (Tr. p. 106). He was a Red Cross Swimming Instructor, enjoyed skiing, hunting and fishing and almost all outdoor activities (Tr. p. 217). Johnson was earning $300 per month in his employment with the Pacific Fruit Express Company (Tr. p. 53). He was a high school graduate, and had had one semester of College (Tr. p. 224). Johnson was not an electrician, and had very little knowledge of electricity; he had never worked around high voltage electricity (Tr. p. 107).

The injuries, the suffering, the present condition and the probable future condition of LaVerl Johnson are all contained in the record (Tr. p. 45-113).

From the date of the accident, November 4, 1950, and for many years prior, the Union Pacific Railroad Company had been furnishing electricity to the Pacific Fruit Express Company, for a valuable consideration, and in connection with such service to its own facilities and to those of the Pacific Fruit Express Company, operated an electrical transmission system in Pocatello, Idaho (Tr. p. 349-161-114-115-189-210). The electrical foreman for the Union Pacific Railroad Company at Pocatello, Idaho, read each month the meter measuring the electricity delivered by the Union Pacific to the Pacific Fruit Express Company (Tr. p. 114). That meter was located in the enclosure of what the Union Pacific Company called the 12.5 Substation (Tr. p. 114). The Union Pacific Railroad Company monthly billed the Pacific Fruit Express Company for the electricity purchased from the Rail-

road Company and used by the Pacific Fruit Express Company (Exhibit 21). The voltage transmitted by the Union Pacific Railroad Company over its lines was 12,500 volts (Tr. p. 349), and seven substations were included in the system (Tr. p. 349). The 12,500 volts of electricity carried over the Railroad Company lines and its facilities, and into its various substations was likewise transmitted into the very substation in which LaVerl Johnson was injured on November 4, 1950 (Tr. p. 161-163-146-153). The Pacific Fruit Express Company, prior to November 4, 1950, had no electricians employed at Pocatello, Idaho, and the Union Pacific electricians did the Pacific Fruit Express electrical work; this specifically included the substation in which LaVerl Johnson was injured (Tr. p. 117-120, 125-130, 133-137, 161, 169, 171). Employees of the Pacific Fruit Express Company were instructed to call the Union Pacific Railroad Company upon occurrence of electrical difficulties (Tr. p. 109, 118, 127, 133, 137-138, 305). Not only did various employees of the Pacific Fruit Express Company on various occasions call the Union Pacific Company for electrical service and repairs, but on various occasions over a period of years the record shows that Union Pacific electricians had been in and did repair work in the substation in which Johnson received his injuries (Tr. p. 114, 117-118, 120, 122, 125, 129, 131, 134, 161, 215, 292, 305, 355). On November 4, 1950, prior to the accident, a Union Pacific Electrician had been in the substation (Tr. p. 134, 136, 138, 139, 140). Various employees had observed Union Pacific Maintenance of Way Trucks along side the substation, with men unknown to them,

working inside the substation (Tr. p. 120, 122, 126, 129-130, 131, 215).

Although electricians of the Union Pacific Railroad Company were frequently in the substation in which LaVerl Johnson was injured, railroad electricians made no inquiry or attempt whatsoever to determine any of the qualifications of the people who were in and around the substation in which LaVerl Johnson was injured, and into which the Railroad Company sent 12,500 volts of electricity (Tr. p. 114-115, 118-121, 123), and at such times as unqualified persons were in the substation with personnel from the Union Pacific Railroad Company, no inquiry was made to determine whether or not those persons were qualified or unqualified (Tr. p. 129, 131). The lead lineman of the Union Pacific Railroad Company electrical road crew, who was in charge of the electrical work in Pocatello, and under whom worked eleven electricians (Tr. p. 341), was familiar with the substation by reason of having observed it, been in it and knowing thoroughly the construction of the substation (Tr. 349-350). Likewise, the electrical foreman of the Union Pacific Shops, who regularly read the meter at this substation had been in the substation on many occasions inasmuch as the meter at the Pacific Fruit Express Company ice plant was located inside the enclosure of what was called the 12.5 substation (Tr. p. 114).

On the date of the injuries, LaVerl Johnson, as an employee of the Pacific Fruit Express Company, and as from time to time, employees of that Company in the past had worked inside this substation, was assigned to work in it,

for the purpose of painting lead wires (Tr. p. 108). Immediately after LaVerl Johnson had lunch on November 4, 1950, he went to the substation and received his injuries when he began to paint a wire in said substation (Tr. p. 110). This wire led to a lightning arrester carrying 12,500 volts of electricity, which sat 3½ feet above the ground (Tr. p. 162). The pole-top switch located in the substation, and as shown by exhibits 14, 16 and 17, as well as exhibit 20, did not disconnect the load of electricity running into the lightning arresters, although it did disconnect the load of electricity running into the transformers (Tr. p. 163, 165-166, 175, 196-197). To kill all of the electrical energy in this substation, it was not only necessary to pull the so-called pole-top switch, but it was also necessary to disconnect by means of a hot stick a series of disconnect switches leading to the lightning arresters (Tr. p. 164-165, 175, 196-197).

The superintendent of the Pacific Fruit Express Company ice plant on November 4, 1950 did not know the pole-top switch did not disconnect all of the power, both in the transformers and the lightning arresters (Tr. p. 299). He was one of the men who let the meter man from the Union Pacific into this substation once a month (Tr. p.293). There was no hot-stick located in the substation for the purpose of pulling disconnect switches (Tr. p. 171-172). Hot-sticks are customary equipment for substations (Tr. p. 172). The type of lightning arrester used in the substation was known as the dry-type, and had been outmoded for many years (Tr .p. 241-243, 201,202). No barriers existed around the lightning arresters themselves inside the enclosure of the substation, and

such was a requirement under the National Electrical Safety Code (Exhibits 24 and 25, exhibits 14, 16, 17 and 20; Tr. p. 180-181-196-197). There were no warning signs, either in connection with the Pole-top switch or the disconnect switches advising that it was necessary to pull both the pole-top switches and the disconnect switches to turn off all the power in the substation (Exhibits 14, 16, 17 and 20; Tr. p. 206). The State Electrical Inspector for the State of Idaho stated that in his opinion, this substation was hazardous because the 12,500 volt conductors of electricity were within reach of any person who might be inside the enclosure, whether authorized or otherwise (Tr. p. 173, 178). He also stated that the general practice and the safety code require, with respect to lightning arresters of the type there used, mounting of the lightning arresters on a high pedestal, beyond reach, and enclosed in barriers (Tr. p. 180), and stated that switches are required to be marked in such a way that they will indicate whether they are open or closed (Tr. p. 181). Elmer V. Smith, qualified as an electrical expert, testified that conductors of electricity within reach of anyone in the station, the lack of labeling on the disconnect switches and devices, (Tr. p. 195-197), the lack of barriers and enclosures around the arresters themselves within the enclosure of the substation, a failure to tie in, or have tied in, the disconnect switches with the pole-top switch, so that one switch would kill all power in the station, were all hazardous conditions, rendering this substation unsafe (Tr. p. 195-198). These matters were all readily ascertainable to a qualified and experienced electrician. (Tr. p. 181-197). Without exception those persons quali-

fied as experienced electricians, stated that it would not be proper for anyone but a qualified person to enter the substation except in company with or under the supervision of a qualified person (Tr. p. 184, 197-198, 246). A District Foreman for the Idaho Power Company stated that substations of that kind in the Idaho Power Company would have either been eliminated or a barrier or other isolation would have been put around the lightning arresters themselves (Tr. p. 239).

The meter which measured the electricity coming into the substation from the distribution lines of the Union Pacific Railroad Company, was located on what is termed the 2300 volt side of the secondary side of the transformers (Tr. p. 167). The electricity which injured LaVerl Johnson was the 12,500 volts of electricity carried on all of the Union Pacific Railroad Company transmission lines in Pocatello, Idaho, and was not the 2300 volts of electricity which was being purchased by the Pacific Fruit Express Company (Tr. p. 162-163).

The Union Pacific Railroad Company has continued to operate in carrying on business with the Pacific Fruit Express Company under the agreement set forth in Exhibit 26, and as the operating Company of all of the property of the Oregon Short-Line Railroad Company (Tr. p. 270-271, 273-275; and Exhibit 29).

ARGUMENT

Naturally the theory of the Appellant is vastly different

from the theory under which the Appellees presented and tried the case. The primary question, as the Appellees view the matter, is whether or not the record supports the verdict and judgment awarding damages for the personal injuries received by the appellee, LaVerl Johnson, where the Appellant, as owner of an electrical distribution system, carrying 12,500 volts of electrical energy, with knowledge of dangerous and hazardous circumstances existing in a substation, sold, furnished and delivered to the Pacific Fruit Express Company, electrical energy. To determine this issue or primary question first requires: A. An appreciation of the duty resting upon a company such as Appellant distributing electrical energy; B. The actual hazardous and dangerous conditions that did exist in the substation in question; C. The notice and knowledge which the Appellant actually had of those conditions. Consequently, we will first consider those three problems in our presentation of the argument, and will thereafter discuss the auxiliary questions raised by the Appellant as to: D. The alleged excessiveness of the verdict; E. The alleged errors in the rulings on evidence; F. Alleged errors in instructions.

A. A DISTRIBUTOR OF ELECTRICAL ENERGY HAS THE DUTY OF EXERCISING THE HIGHEST DEGREE OF CARE.

A study of Appellant's Brief indicates that its argument is founded on the theory it in no way was a distributor of electrical energy. Necessarily then, a consideration of the entire record relative to this particular matter must be had. The Superintendent of the Pacific Fruit Express Company plant testified directly (Tr. p. 210) that the Pacific Fruit

Express Company purchased its electricity from the Union Pacific Railroad Company and Exhibit 21 was identified by the Superintendent of that Company as a billing received by the Pacific Fruit Express Company from the Union Pacific Railroad Company for electrical energy furnished by Appellant. The same witness further testified (Tr. p. 211) that regular monthly billings of the same nature were received by his company from the Union Pacific Railroad Company. Earl R. Gilbert, District Foreman for the Idaho Power Company, testified that the electricity received by the Pacific Fruit Express Company in Pocatello is tapped off the Union Pacific Batiste Line (Tr. p. 161).

Auburn C. Taylor, the lead electrician of the Appellant at the time of the accident in Pocatello, Idaho, with eleven electricians under his supervision, testified directly that the Union Pacific Railroad Company had its own transmission lines, distributed 12,500 volts of electricity through some seven substations (Tr. p. 349). Taylor also testified that if the Pacific Fruit Express Co. needed electricians, either day or night, someone would be furnished to them (Tr. p. 355). Erving J. Eskelsen, electrical foreman for the Union Pacific Railroad Shops at Pocatello, testified that he read the meters measuring the delivery of electricity by the Union Pacific to the Pacific Fruit Express Co. in Pocatello each month for seven years (Tr. p. 114). Under these circumstances there is no doubt as to the furnishing and distribution of electrical energy by the Appellant to the Pacific Fruit Express Co.

Exhibits 22 and 23, as introduced in evidence, were general orders of the Public Utilities Commission of the State of

Idaho relative to the adoption of the Bureau of Standards Handbook as to electricity. Exhibit 24 was the National Bureau of Standards Handbook H32. Exhibit 25 was the Idaho Minimum Safety Standard Practice Handbook, as adopted by the Idaho Industrial Accident Board on the 27th day of April, 1950. Section 211 of the National Bureau of Standards Handbook, page 32, provides:

> "All electric lines and equipment shall be installed and maintained so as to reduce hazards to life so far as practicable."

It is Appellant's view that there is nothing to be decided, and that there was nothing to be determined by the jury or the trial Court in so far as the factual situation is or was concerned. If the matter is or was as simple, the matter should not have been presented to a jury.

The facts are, however, that the case was tried with great care and deliberation on the part of the trial Judge, and the record is amply sufficient, conceding that there is a conflict of testimony on some important issues, to uphold and justify the verdict of the jury in finding that the Appellant was liable under the instructions which correctly stated the law of the case.

It was not the condition of the lightning arresters, or the fact that they were not barricaded and did not comply with the Safety Code, or that the pole-top switch did not de-energize the station that caused the injuries to LaVerl Johnson. It was the electrical energy that caused his injuries, and that electrical energy was transmitted by the Appellant. If no elec-

trical energy had been directed into the lightning arresters, there would have been no injuries, no claim of negligence and no litigation. All of the energy or current up to the point where LaVerl Johnson was injured belonged to the Appellant and it was not that electrical energy that was paid for, by the Pacific Fruit Express Company.

The Appellant in the trial undertook to meet the issue of having been called repeatedly to service the electrical equipment and the electrical needs of the Pacific Fruit Express Company, fully realizing its responsibility if the Appellees maintained their contention under the theory upon which they tried the case.

The Appellant was unable to successfully meet the proofs submitted by the Appellees and the most that can be said is that it was a question for the jury.

The authorities place a positive duty upon those who have electricity under their control to exercise the very highest degree of care and Appellant, in an attempt to relieve itself from duties which the Courts have so unanimously placed upon those dealing in electricity, attempted to lay great stress upon the fact that it and its employees did not have control of the key to the substation. Rather than this being a circumstance to its advantage, it is to the contrary, and is most damaging. Mr. Eskelsen, an experienced electrician employed by the Railroad, knew that unskilled non-electricians were in control of the substation into which his principal transmitted 12,500 volts of current and Eskelsen knew that the substation was on land owned by his principal, that it was dangerous, hazardous and out-moded, and he knew that any layman would

have a right to believe that the pole-top switch would de-energize the entire substation. He knew that the arresters were in reach of any person and that they were hazardous and dangerous. He knew these matters because he was a qualified electrician and because such matters, according to the testimony, were readily ascertainable by any qualified electrician.

Shoup had a key, and he didn't know that the pole-top switch would not de-energize the substation, and Eskelsen made no inquiry whatsoever and did not interest himself in whether or not Shoup was qualified. The testimony also shows that the Pacific Fruit Express Company did not have electricians and on page 35 of the Transcript, in the examination of Mr. Auburn Taylor, the electrician upon whom the Appellant so greatly relies, where an objection had been made by the Appellant to a question as to whether or not the Pacific Fruit Express Company had any regular or competent electricians, the Court stated:

> "It may be immaterial, but I think all of the officers and the supervisors who testified said that they didn't have any (electricians) and I think it is recognized that they did not. * * *".

No objection was made to the Court's remark in that regard, and it was recognized from the beginning and throughout the trial that the Pacific Fruit Express did not have any electricians in its employ; that when electricians were called the telephone number 268 was the number posted, and that was the telephone number of the Appellant, and the employees at the Pacific Fruit Express Company knew that they were to

call the Union Pacific Railroad Company electrical department should any electrical service be required.

All of these facts regarding the electrical service furnished by the Railroad to the Pacific Fruit Express Company were circumstances the jury was entitled to consider with all of the other evidence as to the notice and knowledge of the Appellant.

It is not without significance that the Appellant did not ask any electrician or expert in the trial of the cause as to the dangerous and hazardous situation existing at the substation or as to what the practice of one furnishing electrical energy under such conditions would be. The Appellant was obliged to content itself with asking merely if there was anything "defective" about the substation. The questions asked by the Appellant of the various witnesses never were to the direct issue involved. No witness was asked by the Appellant whether or not under circumstances where unqualified men had keys to this substation and where it was known that they were entering the substation was it the practice for a distributor of electrical energy to continue to supply high voltage into such a substation.

The fact that the Appellant had no independent right of entry into the substation and that it was required to procure a key, makes no difference at all if after acquiring a key, and if after repeated entry into the substation the Appellant, through its agent found out and was charged with knowledge that the substation did not comply with the law of the National Electric Code and was dangerous and hazardous.

Appellant is a Railroad and an efficient one, but they decided to go outside of their field and enter into the distribution of electrical current in large amounts. However, the Railroad still demands that their use of electricity and their distribution of electricity be considered as a part of the transportation business, and that they should not be held to or governed by the law applicable to those distributing electrical energy.

Having tried the case upon the theory that the Appellant had nothing to do with the substation and had no responsibility in regard to it, and had no duty as to any electricity transmitted into the substation, the Appellant can only be entitled to a reversal if the law is that one distributing and selling electrical current cannot be liable, regardless of knowledge or notice of hazardous, dangerous and perilous conditions.

That is not the law.

In *Hagen & Cushing v. Washington Water Power Co.*, 9th CCA, 1938, 99 Fed. 2d 614, the Court said, at page 617 of the opinion:

> "The Supreme Court of Idaho has declared that: 'Electricity is recognized as one of the most destructive agencies we have, and the highest degree of care and diligence is required by those who are operating electric plants in order to avoid injury to person and property' * * * thus, the question is whether or not there is any substantial evidence that Appellee breached its duty to use 'the highest degree of care and diligence * * * in order to avoid injury' to Appellant's property."

The Court then said:

> "The rule in the Federal Court is that * * * where uncertainty arises either from a conflict of testimony or because the facts being undisputed, fairminded men may honestly draw different conclusions from them, the question is not one of law, but of fact to be settled by the jury * * * ."

In Shank v. Great Shoshone and Twin Falls Water Power Co., (9th CCA) 205 Fed. 833, the trial Court granted a Motion for non-suit in an action to recover damages for personal injuries received by the Plaintiff in moving a derrick along a public highway near Buhl, Idaho, when the derrick came in contact with power transmission lines of the Defendant. The highest point of the derrick was 27 feet 6 inches from the ground, and Defendants wires crossed a portion of the highway at the point of the accident, were not insulated and carried 23,000 volts of electricity, with the closest wire 27 feet 3 inches from the ground. The Circuit Court reversed, citing and discussing many cases, holding that electric companies are bound to the highest degree of care. The Court also quoted with approval from Railroad Company vs. Stout, 84 U. S. 657, 663, 21 L. Ed. 745:

> "Upon the facts proven in such cases (cases where the proof is clear and certain), it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used

> and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they themselves have seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

Ellis v. Ashton & St. Anthony Water Power Co., 41 Ida. 106, 238 Pac. 517, was cited in the Chase v. Washington Water Power Co., 1941, 62 Idaho 298, 111 Pac. 2d 872 case. That decision, in part, said:

> "'Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public therefor, while presumed to know that danger may be present, are not bound to know its degree in a particular case. The company, however, which uses such a dangerous agent, is bound, not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in the proximity of its wires and liable to come accidentally or otherwise in contact with them'." (Aurentz v. Nierman, 76 Inc. App. 669, 131 N. E. 832.)

Staab v. R. M. Bell Tel. Co., 23 Ida., 314, 129 Pac.

1078, was an action for wrongful death where an employee of the R. M. Bell Telephone Co. was electrocuted while working on a telephone line close by electric light wires, and the negligence alleged was the failure to properly insulate the electric light wires with the knowledge that telephone line men would be required to come in close proximity to such power lines. The Court there said:

> "The appellant was engaged in the business of generating, transmitting and distributing the most dangerous and least understood article known to the business or commercial world, namely electric energy —an unseen force and it was chargeable with the legal duty of so handling it as to protect the public and especially those who might be called upon to come near or in contact with its wires from dangers they could not see and which they might readily overlook * * * ."

In Chase v. Washington Water Power Co., 1941, 62 Ida. 298; 111 Pac. 2d 872, the Defendant power company maintained a high tension transmission line and there was a guy wire running some distance down to the ground and coming in contact with a wire fence. It was found that two chicken hawks engaged in aerial battle interlocked their talons, and while so attached, one touched the high tension line and the other touched the guy wire transmitting electricity by a connecting link down through the guy wire and down into the barbed wire fence which transmittted said electricity and started a fire, and ultimately the barn some distance away was destroyed. The Court said:

> "It is admitted that the highest degree of care must be exercised by those engaged in the generation and dis-

tribution of electricity * * *."

"* * * In the light of these authorities, and viewing the actions of the chicken hawks in retrospect, it can be seen that the Appellants' negligence in permitting the uninsulated guy wire to remain in contact with the wires in the fence were the decidedly contributing factors in bringing harm to respondent. The record shows that hawks abound in the territory through which appellants' power line passes, and that upon other occasions birds caused disturbances in the transmission of electricity by way of these wires. While, from an anticipatory point of view, the exact manner in which these hawks interferred with the wires upon this occasion may seem unusual or extraordinary, viewed in retrospect it cannot be said to have been unforseeable."

"A result of the actor's tortious conduct may be one which, either in its extent or the manner in which or the sequence of events through which the conduct operates to bring about the harm, is altogether different from the result which the actor at the time of his negligence recognized or should have recognized, as likely to result therefrom. Nonetheless, after the event, such a result may not appear to the court or jury to be so highly extraordinary as to prevent the actor's conduct from being a substantial factor in bringing it about." (Restatement, 2 Torts 1165, Sec. 433, page 1167; see also Restatement, 2 Torts 1165, Sec. 431, page 1159).

"General practice in maintaining and operating electric power line will not excuse negligent act unless such practice is consistent with due care."

" * * * in addition, the evidence established that the appellant negligently permitted a condition to arise in the appliance with which it conducted this dangerous energy into vicinity of respondent's property, which made it inevitable that injury would result to the respondent, if, in any manner, the electricity should

escape from the high voltage transmission wire to the guy wire."

Finally the Court said:

"Considering all the facts shown by the evidence in this case, the question whether the appellant was negligent, and whether its negligence was a proximate cause of respondent's injuries, was not one of law for the court, but of fact for the jury, and the jury, having by its verdict determined that question against the appellant, their findings should not be reversed."

In 18 Am. Jur-Electricity, Sec. 48, page 443, it is said:

"The degree of care required to be used in the production, distribution, and use of electricity a force concerning which about the only thing certainly known is its highly dangerous character, is stated in various terms which, perhaps, convey merely one idea. To declare that the utmost care must be used to prevent injury sounds different in statement than to say that ordinary care must be used in view of all of the circumstances; but when analyzed, the meaning is not far different, for the ordinary care required under the circumstances is relatively a high degree of care when put into practice * * * According to numerous decisions, where the wires maintained by a company are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its plant to prevent such injury * * *"

Appellant relies on Exhibit 26, (Tr. p. 161).

Exhibit 26, Clause 4 of that agreement, reads as follows:

> "The Pacific Company agrees to pay the Railroad Company for the electric power delivered under this agreement the same average rate per kilowatt hour as the Railroad company pays to the Idaho Power Company, plus 10% which is to include the transmission line and transformer losses and the fixed charges and maintenance on such railroad equipment and apparatus as is used by the railroad company for delivering electric power to the Pacific Company."

Clause 5 of that agreement reads:

> "The Railroad Company will install and maintain, at the expense of the Pacific Company, standard meters to measure the electric service used by the Pacific Company and will inspect such meters from time to time."

Under that agreement the Railroad Company also reserved the right to test the meters at its own expense at any time (Clause 6 of Exhibit 26, Tr. p. 316). Likewise, under Clause 1 of that agreement, reading as follows:

> "The Railroad Company will construct the pole and wire lines and a 600 KVA transformer station necessary for the delivery of power at approximately 2300 volts and 60 cycles to the Pacific Company hereunder. Maintenance, repairs, renewals and changes in said construction shall be made by the railroad company at the cost and expense of the Pacific Company."

the Railroad Company agreed to deliver to the Pacific Fruit Express Company electrical energy and to assume the responsibility, at the expense of the Pacific Fruit Express Company, for the maintenance and repair necessary to the delivery of such electrical energy through apparatus used.

This same agreement, Exhibit 26, reserved to the Railroad the right at any time to generate in its own plant all or part of the electric power used at the Pocatello terminal, and the Pacific Company agreed to pay to the Railroad Company for electric power delivered under the terms thereof at such new rate as may be specified by the Railroad Company (Tr. p. 318). Absolutely nothing in the record establishes that this agreement was ever cancelled or that the Pacific Fruit Express Company does not continue to take its power from the Union Pacific Railroad Company under and by virtue of this agreement. In fact, the proof is directly to the contrary inasmuch as the witnesses testified, without dispute or contradiction, that the Pacific Fruit Express Company does purchase its electricity from the Union Pacific Railroad Company, and witness Arter testified that Appellant had taken the place of the Oregon Short Line Railroad Company under the agreement, and was carrying on in their stead (Tr. p. 270). See also testimony of witness Meyers (Tr. p. 222-224). Furthermore, a study of Exhibits 27, 28 and 29 shows that the real estate upon which the substation was located is owned by the Oregon Short Line Railroad Company, and that that property has been leased to the Union Pacific Railroad Company, as well as all other railroad properties of the Oregon Short Line Railroad Company, and that in turn, the Union Pacific Railroad Company has leased the real estate to the Pacific Fruit Express Company. However, the theory of liability of the Appellant does not proceed upon the basis of landlord and tenancy, but the theory of the Appellees has been and is now that the Appellant is liable under the facts and circumstances of this case and that

the verdict and judgment are wholly proper in view of the transmission of energy by the Union Pacific Railroad Company and its resultant duty under the circumstances of the case.

Completely contrary to the general theory of Appellant's Brief, the Appellees did not bring this action, nor did they try the case upon a theory of negligence because the Appellant did business with the Pacific Fruit Express or because the Railroad Company built and constructed the substation in the first instance, or because the Appellant owns the land upon which the substation is located and the Pacific Fruit Express Co. leases the land from the Appellant. This action was brought upon the theory and the Appellees have a right to recover on the verdict and the judgment, because the record absolutely supports the theory that Appellant owned and controlled a complete electricity distribution system, carrying 12,500 volts of electrical energy; that its system consisted of seven substations and was presided over by an electrical foreman in its shops and an electrical foreman or superintendent of its system outside of its shops; that in using this amount of electrical energy it delivered and furnished the same to the Pacific Fruit Express Co. through its substation where most dangerous and hazardous conditions existed. The law is that where one handling electricity has notice and knowledge of circumstances or conditions creating dangerous and hazardous perils to life or property, positive action must be taken to see that such conditions are corrected, or no longer furnish electricity to such installations.

It cannot be emphasized too strongly that the 12,500

volts of electricity which injured the Appellee, LaVerl Johnson, was electricity distributed by the Appellant over Union Pacific Railroad Co. transmission lines into the substation, prior to being metered and reduced to the voltage for which the Pacific Fruit Express Co., paid (Tr. p. 162-163).

At pages 32 and 33 of Appellant's Brief, various cases are cited in support of the assertion of the Appellant that no liability can be charged to it and no duty was owed to LaVerl Johnson because it did not own, control, or maintain the appliances and the lines through which the electricity ran which caused the injuries to LaVerl Johnson. Those cases, upon careful scrutiny, show that in no instance did the Defendant have notice or knowledge of the conditions and circumstances upon which the Plaintiff asserted a duty rested.

The Appellees made no objection to the introduction of the various contracts and leases in behalf of the Appellant. They were and are not important or determining factors in this case. It was, of course, to the interests of the Appellant, if possible, to try and have this case decided upon its theory that not owning the substation, it could not have been liable and the Exhibits could serve no other purpose, and Appellant presented no other propostion in the trial, and proceeded on the theory that the question of notice and knowledge of the existing conditions at the substation and that the question of the National Safety Code provisions relative to electricity did not in any way concern the Appellant. With this position, Appellee cannot in any manner agree, and did not agree at trial. The law is not now and has never been that one distributing, furnishing, disposing of and selling electrical current in such

large voltage as was the fact here, cannot be liable regardless of knowledge and notice of hazardous, dangerous and defective conditions, and if such were the law, it would simply mean that one engaged in the distribution of and the selling of electrical energy may deliver that energy to any type of installation owned by other persons and shut its eyes entirely to all the rules and regulations with reference to safety in the distribution and handling of electricity.

In addition to the notice and knowledge which we shall hereafter discuss, and which the record shows beyond any doubt the Appellant had of the conditions in the substation, the fact is that the Appellant did repair and maintain this particular substation and on many occasions, including the very day that the accident occurred, railroad electricians had been in the substation. The record also conclusively established that any competent electrician would and could readily ascertain the hazards of the substation and the precise conditions which made it perilous upon any reasonable examination or inspection.

In *Public Service Co. v. Elliott* (1941, CCA 1st) 123 Fed. 2d 2, the Plaintiff was one of a number of High School students admitted by the Defendant electric company to the high tension room of its substation on an inspection trip of a sort that had been made for several years, and while there was injured by electricity. The Court, holding the Defendant liable, said:

> "At the time the plaintiff and his classmates, to the knowledge of the defendant, entered the dangerous high tension room, defendant had control of a force

> of high voltage electricity which it was causing to flow through the installations there. Hence defendant came under a duty of care to see that this force inflicted no hurt upon the licensees present—a duty that would call for either shutting off the power, or (as a more practical alternative) giving an adequate warning if it were to be reasonably anticipated that the visitors might not fully and intelligently understand the dangers lurking in the room. That the law should impose such a duty in the present case is all the more obvious from the fact that the defendant's employee, Cates, led the boys into the high tension room and thus by his positive conduct brought the plaintiff into the zone of danger."

In the reported case there were no warning signs on various appliances in the substation, and a qualified expert testified that according to recognized principles of safety in installing high voltage equipment, unguarded live parts should have a minimum vertical clearance of 9 feet 6 inches above the floor, or "well out of reach" by an inadvertent gesture of the hand. The expert stated that the installation upon which a current transformer rested could have been made higher so as to obtain the desired clearance, without impairing operating efficiency. The Court quoted with approval *Castonguay v. Acme Knitting Machine & Needle Co.* (1927) 83 N. H. 1, 136 Atl. 702 as follows:

> "Negative conduct in failing to stop a force in active operation may be as careless towards a trespasser as positive conduct in putting such a force into operation. Not to shut off an electric current in a broken wire about which trespassing children are seen to be playing may be as negligent as to turn on a current under such conditions. Inaction as well as action may be negli-

> gence, and intervention relates to sequence in time rather than the physical aspects of conduct. The duty and care being established, it applies to conduct of omission as well as of commission in logical conformity with the principal that relationships determine the requirement as well as the standard of care. Required to take into account a known trespasser's presence one may not carelessly cause force to be exerted against him either by active or passive conduct."

A question of contributory negligence also existed in the case and the Court said:

> "Liability turns, then, upon questions of fact: (1) Would a reasonable man in Cate's position have led the boys into the high tension room without giving them emphatic warning that within easy reach of persons standing in the aisle were live exposed parts deadly, not only to the touch, but also to the near approach of a hand extended in casual gesture. (2) Was the plaintiff guilty of contributory negligence?"

Both of these questions the Court said were properly for the jury under the evidence and the Court also went on to say that although the power company had no duty to redesign its station so as to eliminate all risks to visitors, the better engineering practice as to high voltage equipment required that live exposed parts in reach of the hand should not be installed or other safeguards should be taken. The court felt that it was certainly reasonable to infer that an ordinarily careful person in the Defendant's position would have realized the risk of injury to unsuspecting visitors and therefore would not admit boys to the high tension room without explicit warning of the dangers to be encountered.

Alabama Power Co. v. McIntosh, (1929) Ala. 122 So. 677, involved an appeal from a jury verdict and the judgment in favor of the mother of a child who met his death from burns while working in a building and using steel wool and gasoline. While so working an electric arc flash came from a wall receptacle, igniting gasoline, causing a fire and the resultant death of the plaintiff's child. The evidence showed that the electrical fixtures had been installed by the Montgomery Electric Co. regularly employed to do the wiring for the Defendant company. The receptacle from which the electric arc came was one forbidden by the National Electrical Code. In regard to such evidence the court said at page 680 of the report:

> "In connection with such evidence, the code being the expression of the matured judgment and experience of men in that business, becomes evidence of correct appliances for such places, and evidence that the use of fixtures forbidden by it is negligence."

Various other evidence was offered by the defendant to show that the actual cause of this injury was not the absence of a proper wall receptacle, but that certain handling of the receptacle by the employees working with the deceased child had caused the electric arc and the resulting ignition of the gasoline and the fire. In that regard, the court said, page 680:

> "The negligence here, if any, consisted in creating or contributing to the creation of a zone of danger to the workmen in the room.
>
> "If installing this class of fixtures was not negligent

> or wanting in due care, it would not become so by the independent negligent act of another converting it into a zone of danger not to be foreseen and avoided.
>
> * * * * * * * * *
>
> "We think, if the jury found negligence in installing and maintaining this fixture, negligence in failing to take due precaution against fire, any negligence of the contractor of the same character, bringing about the immediate danger, may be considered a concurring cause, and not the supervening and sole proximate cause of the injury, and this without regard to whether such concurring negligence could be anticipated.
>
> "In such case there is direct cause or connection between the negligence of defendant and the injury. There is a present continuing negligence endangering persons in the building, without which the accident would not have occurred. In all cases of concurring negligence, it may be said that one would not have produced the result without the other. If this be a defense, both would escape, although both would be in the wrong. The present danger caused by present maintenance of wiring in a negligent manner concurring with present negligence of another, both creating the conditions causing the mishap, renders both liable * * *"

In the reported case it was strongly contended by the defendant that the employer of the deceased child was actually in control of the premises and in control of the work going on there at the time of the injury, and that the employer was charged with the knowledge that the use of gasoline and steel wool around electrical appliances was dangerous and hazardous. The court, as to this, merely said that any charges in that regard were not justified under the evidence and that the entire matter was for the jury.

In *Snook v. City of Winfield,* 1936, Kan. 61 Pac. 2d 101, plaintiffs brought action for the wrongful death of their daughter from electricity alleged to have been negligently furnished by the defendant city. The defendant appealed. Plaintiff and various of his neighbors built their own lines to their homes under instructions from the city, and the city itself put in the transformers necessary to the service, as well as meters in the various residences involved, including the plaintiff's. After the construction was completed the city furnished electricity to the line of the plaintiff and his neighbors, charging the same amount as to patrons who resided in the city. Whenever there was trouble the city was notified and promptly sent one or more of its men who corrected the trouble. There was a history of various trouble and of the city employees coming to the homes of the various persons on this particular line and attempting to repair the difficulty. After one such occasion the radio in plaintiff's home burned out; plaintiff disconnected wires running from his pump to the ceiling of the basement, following the occasion of the radio burning out. The following morning his daughter went to the basement, a crash was heard, upon investigation the daughter was found dead, with a burned place across the inside of her hand, apparently from the wires disconnected by the plaintiff the night before. Testimony was offered to the effect that the transformer, located about 45 rods from the Snook house, was not properly installed or operating and a strong current of electricity had been grounded. At the trial the city's theory was that the plaintiff and others had paid the cost of constructing the line and installing the transformer

from which the electricity was taken from the city's high line, and had at their own expense also wired their buildings and put in their electrical equipment; that as a consequence the city merely delivering electricity to the plaintiff, with no ownership or control over the distribution lines from the point of the city's high line, and with no notice that the apparatus was out of repair, was not liable for injury or damage which occurred on the distribution lines or equipment of the plaintiff. The court said at page 104:

> "* * * The actual ownership of a distribution line is comparatively unimportant insofar as liability is concerned. The principal thing is the control of its upkeep and repairs. Here, while it is clear that Snook and Caldwell paid for the construction of this line, after it was constructed, the city took charge of it for the purpose of distributing electricity over it. Snook and Caldwell were told if anything went wrong with it to inform the city; that it would look after troubles on the line. In this case the City Manager testified that the city intended to give these customers the same service given the customers in the city. The city had done that ever since the line had been built. It had taken out one transformer and put in another without saying anything to Snook or Caldwell about it, and at various times made repairs necessary for the proper functioning of the electric current it sold them.
>
> "Irrespective of ownership or control of the distribution lines and appliances, there is testimony that the defendant knew there was something seriously wrong at the Snook place. * * * With knowledge of these defects the city continued to supply electricity to the Snook home. Even if one who generates and sells electricity does not own or control the wires or apparatus over which it is distributed or used, the

> exercise of due care requires that it should not supply electricity over known defective wires or appliances. These facts distinguish the case before us from the Hoffman case (Hoffman v. Power Co. Kan 138 Pac. 632, cited by appellant at page 32 of his brief) and others of like import."

Bristol Gas & Elec. Co. v. Deckard, 1926, CCA 6, 10 Fed 2d 66 further illustrates the duty. There, plaintiff's decedent was found dead under conditions suggesting his death by an electric current while attempting to start a machine by placing his hand on the handle attached to the starter box. The deceased was employed by a brick manufacturer and the defendant furnished the power to the brick company for operating the brick making machinery. Jury found for the plaintiff and the judgment was affirmed on appeal. The defendant there tried its case on the theory that the defendant had no duty to inspect or keep the brick company's machinery in repair, that the line over which the operating current was transmitted from a point outside the brick plant to the plant was owned and controlled by the brick company and that such ownership and control of the machinery and the transmitting line by the brick company relieved the defendant of any duty. In that regard the court said: page 67—

> "* * * Knowledge by defendant of the alleged defective condition of said wiring and appliances and its continued furnishing of electrical current after and with such knowledge would make it liable for the death of decedent caused thereby. (Cases cited). Under such circumstances defendant's duty to exercise due care to protect the employees of the brick company would be the same as that required to safe-

guard the traveling public from over hanging wires. Denver Consolidated Elec. Co. v. Walters, Colo. 89 Pac. 815."

The court next concerned itself with the question of whether or not there was substantial testimony tending to show that the defendant knew of the defective condition of the wiring as being such as it might reasonably have apprehended was liable to cause injury or death to the brick company's employees through the continued flow of the current into the plant. On this phase, testimony shows that about a year before the death of plaintiff's decedent a transformer on the starter boxes burned out and that this had been caused by a leaky roof, but that after new wires were installed, nothing was required by the electric company of the brick company to repair the leaky roof. Testimony showed that the defendant electric company had knowledge that some shocks were had at the brick plant on rainy days, and the record does not show that the defendant took any steps to have the leaky roof remedied or even to advise the brick company of the condition. From such testimony, the court, page 68 of the report, said:

"* * * We think it was open to the jury to find that defendant had knowledge of conditions making unsafe the use of the wires and appliances in and about the starter box, and that defendant should reasonably have apprehended that one attempting to take hold of the handle to start the machinery was likely to receive a dangerous electric shock, and that, in continuing with this knowledge, to supply a current of 2300 volts (which it scarcely need be said is a deadly current) was guilty of negligence caus-

ing decedent's death."

The defendant electric company argued that it was as reasonable to suppose that a lightning charge had caused the death as the leaky roof and the wet motor. However, the court merely said that "considering the testimony in the case and its aspect most favorable to plaintiff, we think the case was rightly left to the jury."

The court further said:

> "We find no error even if the proximate cause of decedent's death was the combined and concurring negligence of the defendant and the brick company."

In reviewing instructions the appellate court had occasion also to approve the trial court's remark in refusing one of such instructions, and that was that the question was merely whether they sent the amount of electricity in there under such circumstances that they might have anticipated trouble, and said the remark was not one that could have misled the jury.

The Bristol Gas & Elec. Co. case just discussed is of importance and is authority in the present case, for there nothing appeared actually defective in the sense of frayed wires or faulty fuses or other such matters, but the matter was simply that the electrical company there furnished power and electricity to the brick plant knowing that the brick plant had a leaky roof which did and would cause on such occasions as it did rain, electrical shocks in the transformer and in the various motors and machinery employed in the plant. In the

instant case the Union Pacific Railroad Company had absolute knowledge and notice of the fact that the substation here was improper, as we shall later demonstrate and as the record so fully shows. That is, the railroad company knew that unqualified persons were going into this substation, where no barriers were around the various lightning arresters and where other wires were exposed and within reach of any person within the substation; where, also, the railroad company knew that no warning signs were on the switches and nothing showed the uninformed that the pole-top switch did not kill all of the power in the substation and that it also required the operation of the disconnect switches to kill the power going into the lightning arrester. Likewise, the various employees of the railroad company who appeared at the substation from time to time had knowledge or should have had knowledge that no hotstick was available in the substation with which to disconnect the 12,500 volts of electricity going into the lightning arresters which were located within some 3 feet 6 inches of the ground.

Appellant, at page 32 in its brief and elsewhere, makes a great point of the fact that there were no defects in the case at Bar, and asserts that the knowledge of hazardous, dangerous and perilous conditions in the substation, in the absence of actual defects as such, placed the railroad company under no duty to stop the electricity going into the substation or to require that the Pacific Fruit Express Co. correct the perilous and hazardous conditions. This is a mere play on words. The definition of defect from *Funk & Wagnall's* new practical *Standard Dictionary* is as follows:

Defect, noun—1. Lack or absence of something essential.

As heretofore pointed out, it is obvious that there was a lack of something essential, to wit, among other deficiencies, an enclosure within an enclosure, and a proper pole-top switch. Defective is also defined as follows:

Defective, adj.—1. Uncomplete or imperfect.

The same comment runs to the definition of the word defective. The definition of hazardous is as follows:

Hazardous, adj.—1. Exposed to, exposing to or involving danger or risk or loss.

And the definition of dangerous as given by the same authority:

Dangerous, adj.—1. Attended with danger, hazardous; perilous; unsafe.

The basic criticism of appellant's brief is that throughout it has only given but half of the rule as to the duty of those transmitting electrical current. That is, it has cited at page 31 of its brief the rule in 20 C. J. page 364, Sec. 49; 29 C.J.S. 611, Sec. 57-a, and the rule in 18 Am. Jr. 498, Sec. 102. But an examination of the additional portion of each of those texts will disclose the following:

> 20 C.J. Sec. 49, page 365: "Whatever the rule may be in this regard, knowledge of the defective and dangerous condition of a customer's appliances would charge even a mere generator and supplier of electricity with liability for consequences, where current

is thereafter supplied to such defective and dangerous appliances. * * *"

And in *29 C.J.S. Sec. 57,* page 57, the same text is found, with the following addition:

"* * * in which case it is the energizing of the line with knowledge of the conditions, and not the conditions themselves which forms the basis of liability."

And in *18 Am. Jur. Sec. 102, page 498,* the rule is expressed as follows:

"It is generally held that where the electric wires or other appliances which have caused injury are not owned or controlled by the company furnishing the power such company is not liable for the damage sustained. The company furnishing the current is not bound to inspect such lines, wires and appliances to discover the defects in installation or other dangerous conditions; and unless the current is supplied with actual knowledge of such conditions, its responsibility ends when connection is properly made under proper conditions and it delivers the current in a manner which will protect both life and property. * * *"

"Where control, or even joint control, of the appliance is reserved and exercised by the company furnishing the power, such company will be liable for a lack of due care. Also, where an electric company engaged in distributing electricity sells and installs electrical equipment and engages to furnish current therefor and keep the equipment in repair, it is liable for negligence in respect thereto. * * *"

In *Null v. Elec. Power Board of City of Nashville,* 1948,

Tenn. 210 SW 2d 490, the rule is expressed in this fashion, page 492:

> "Where a company merely transmits its electric current from its line to the consumer's wires, which it did not install and does not control, it has no duty to inspect such wires and is not liable for injury caused by defects in them. * * *
>
> "But where a company knows of such a defect, its duty is to stop and not send its deadly current to the defective wiring of the consumer, and it is liable for injuries to person and property caused by breach of this duty. Gas & Elec. Co. v Speers, Tenn. 81 SW 595; Bristol Gas & Elec. Co. v. Deckard 6 Cir. 10 Fed 2d 66; cases cited in Annot. 134 ALR 526-529.
>
> "In such a case the company's duty to protect the consumer and others lawfully on his premises is similar to that which it owes the public to protect them from its overhanging lines (Bristol Gas & Elec. Co. v. Deckard, supra) and this requires it to exercise the highest or utmost degree of care * * *"

Johnson v. Alabama Power Co. 1935, Ala. 159 So. 694, at page 696, sets forth the proper rule:

> "In order, therefore, to make the generator of electricity liable it must be averred and proved that it continued to furnish the dangerous current after knowledge that the purchaser permitted the electrical equipment to become defective, and therefore dangerous to life and property. Whenever such conditions exist, and the seller has notice and knowledge of it, it becomes his duty to cut off service from the purchaser; we so held in the case of Ala. Power Co. v. Sides, 155 So. 686."

To the same effect cases cited at page 526 of 134 ALR; also cases set forth in 32 ALR 2d, pages 248, 249, and following. In *Oesterreich v. Claus,* 1941, Wis. 295 NW 766, the Power Co., conceded that if it had had notice of the condition there existing it would have been its duty to cease energizing the line until the owner took the necessary steps to make it safe. There the plaintiff contended that the power company was negligent where a power line ran through an orchard and the line was hidden by the trees, even though the power company did not own nor control or have any knowledge relative to the line, but merely served power to the line which was owned by a farmer. The deceased, an invitee, was injured when he climbed one of the fruit trees for the purpose of getting apples and came in contact with the line hidden in the top of the trees. The court recognized the general rule, as follows.

> "When a transmission line is neither built, owned, nor controlled by a utility sought to be charged with damages arising out of its condition, such utility is neither bound to inspect the line nor obligated to respond in damages for injuries sustained by its defective construction or condition unless it supplies current actually knowing of these conditions and the current is the cause of the injuries sued for, in which case it is the energizing of the line with knowledge of the conditions and not the conditions themselves which forms the basis of liability. * * *"

See also the following cases:

Appalachain Power Co. v. Mitchell's Administratix, 1926,Va. 134 SE 558;

International Elec. Co. v. Sanchez et al 1918, Tex. 203 SW. 1164;

Dabbs v. Tenn. Valley Authorities, 1952, Tenn. 250 SW 2d 67;

Aurentz et al v. Nierman, 1921, Ind. 131 NE 832;

Hawkins v. Lamont Hydro-Elec. Corp. 1924, Vt. 126 Atl. 517.

B. DANGEROUS AND HAZARDOUS CONDITIONS EXISTED IN THE SUBSTATION AND WERE A PROXIMATE CAUSE OF THE INJURIES TO LaVERL JOHNSON.

Section 54-1001 of the *Idaho Code reads:*

> "54-1001—Declaration of policy.—From and after the taking effect of this act, all installations in the State of Idaho of wires and equipment so convey electric current and installations of apparatus to be operated by such current, except as hereinafter provided, shall be made in substantial accord with the National Electrical Code as approved by the American Standards Association, relating to such work as far as the same covers both fire and personal injury hazards, as the same shall be compiled and published from time to time; provided that the provisions of this section shall not apply in incorporated cities and towns which by ordinance or building code prescribe the manner in which wires or equipment to convey electric current and apparatus to be operated by such current shall be installed."

The National Electrical Code as referred to in the above

statute was introduced into evidence as Exhibit 24. That code provides, in part, as follows:

> "Section 213-a, subsection 5, Handbook 32: "Defective lines and equipment shall be put in good order or effectively disconnected."
> Section 93-c Handbook 32: "Mechanical protection and insulating guards shall extend for a distance of not less than 8 feet above any ground, platform or floor from which grounding conductors are accessible to the public."
>
> Section 35, Handbook 32—"The term 'guard' means covered, fenced, enclosed, or otherwise protected, by means of suitable covers or casings, barrier rails, or screens, matts, or platforms, to remove the liability of dangerous contact or approach by persons or objects to a point of danger."
>
> Section 211, Handbook 32—"All electric lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practicable."
> Section 216-b, Handbook 32—"All switches shall indicate clearly whether they are open or closed."
> Section 216-c, Handbook 32—"Pole-top switches accessible to unauthorized persons shall have provisions for locking in both open and closed positions."
> Section 24, Handbook 32—"Electrical supply station or a substation means a building, room, or separate space within which electrical supply equipment is located and the interior of which is accessible, as a rule only to properly qualified persons."
>
> Section 55, Handbook 32—"The term 'qualified' person means one familiar with the construction and operation of the apparatus and the hazards involved."

Section 61-302 of the *Idaho Code* on the date of this accident and in common with all of the regulations above

mentioned, as well as the Idaho Code section cited, provides:

> "Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facility that shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and shall be in all respects adequate, efficient, just and reasonable."

An examination of the record leaves no doubt but that the Idaho Code and the National Electrical Code had not been complied with on November 4, 1950. The District Foreman for the Idaho Power Company examined Exhibit 20, which was an enlarged photograph of the substation involved, taken shortly following the accident and at a time when the conditions in the substation were the same. He, as well as the person who was State Electrical Inspector at the time of the accident, and Elmer V. Smith, an electrical expert, explained that in this substation the pole-top switch did not break the circuit of the power running into the lightning arresters, although it did kill the power running into the transformers. In other words, when the switch was open the line into the lightning arresters was still hot (Tr. p. 164-165-174-196). The State Electrical Inspector stated that in his opinion the 12,500 volt conductors within reach of any person who might be inside the enclosure, whether authorized or otherwise, would be a hazardous condition, (Tr. p. 178) and so stated because such persons might, either through a lack of knowledge or misunderstanding or through accident come in contact with those conductors (Tr. p. 179).

He further stated that the general practice where such an arrester is used is to mount them on a high pedestal or to put them beyond reach and beyond accidental contact and the safety code provides that there shall be barriers where such conditions do exist (Tr. p. 180). The code required that such barriers be provided for lightning arresters of this type even though the lightning arresters are situated inside the substation itself which is enclosed. (Tr. p. 180). Elmer V. Smith, an electrical expert, testified similarly, (Tr. p. 195-197). Mr. Gilbert, the Idaho Power Co. electrical foreman, testified that if there had been such a substation in the Idaho Power Co., they would have put a barrier or isolated those lightning arresters or eliminated them (Tr. p. 239).

All of the electrical experts testified positively that no man should have been in that yard unless he was qualified (Tr. p. 184-198-239).

Furthermore, each of the experts testified directly that switches are required to be marked in such a way that they will indicate whether they are open or closed (Tr. 181-191-192-195-197-245-246). There was nothing in that substation which would tell anyone but an experienced electrician what was dead and what was not as to the current in the substation.

Hot sticks are customary equipment for such a substation (Tr. p. 172) and in this substation there were no hot sticks (Tr. p. 171-172). Current to the lightning arrester in this substation could not be eliminated without the use of hot sticks (Tr. 175).

The lightning arresters in use in this substation were outmoded and the so-called pellet type lightning arrester was generally in use at the time of the accident and had been for a number of years (Tr. p. 201-241-243).

Without exception, the witnesses qualified as expert electricians, testified that the conditions existing in this substation were readily ascertainable and apparent to a qualified electrician (Tr. p. 181-197, 201-246).

It is not without significance that the Union Pacific Railroad Company called no experts and offered no testimony with regard to the hazardous or perilous conditions in the substation. Appellant's lead electrician was not questioned as to the hazardous or perilous condition, and appellant's witness, Melvin Judge, testified it was not safe for laborers to be in the enclosure (Tr. p. 313).

All of the cases referred to under the first heading of this argument amply illustrate that where conditions exist as shown by the record, the duty devolves upon the company, with knowledge of such conditions, furnishing electrical energy into such installations, to stop the current for the very reason that the company can foresee a likelihood of injury to person or property.

C. THE APPELLANT, UNION PACIFIC RAILROAD COMPANY, HAD NOTICE AND KNOWLEDGE OF THE HAZARDOUS AND PERILOUS CONDITIONS EXISTING IN THE SUBSTATION, AND FAILED TO TAKE ANY STEPS TO REQUIRE THAT THE PA-

CIFIC FRUIT EXPRESS CO. CORRECT THE CONDITIONS, AND IN THE ABSENCE OF SUCH CORRECTIVE STEPS TO TURN OFF THE ELECTRICAL ENERGY FEEDING INTO THE SUBSTATION.

The record abounds with notice to qualified electricians of the appellant, of the conditions in this substation. The electrical foreman of the Union Pacific shops in Pocatello monthly for seven years read the meter; his testimony is found on pages 113-115 of the transcript. Auburn C. Taylor, the lead electrician of Pocatello, Idaho, had been in the substation on a number of occasions and was familiar with the construction and the installations there, and he positively testified that Union Pacific electricians were available for service to the Pacific Fruit Express Company day or night (Tr. p. 349-355). The record is absolutely uncontradicted that the Union Pacific Railroad Co. electricians did electrical work in and around the substation and had been in the substation on many occasions. The perilous conditions in the substation were readily ascertainable and apparent to any qualified electrician, and with notice and knowledge of those conditions, appellant did not remedy the same. On the very day of the accident, a Union Pacific electrician was present at the Pacific Fruit Express Co., ice plant and particularly at the substation in question. Employees of the Pacific Fruit Express Co., testified that on various occasions they had observed Union Pacific Railroad Co., maintenance trucks pull alongside the substation and had observed men who came in those trucks inside the substation working (Tr. p. 120-126). One of these employees saw the Union Pacific

maintenance truck pull alongside the substation prior to the accident, and on the very morning of that day (Tr. p. 126). One of the foremen at the Pacific Fruit Express Company ice plant testified he was introduced to a Union Pacific electrician on the morning of the date LaVerl Johnson was injured and that that Union Pacific electrician was there prior to the power being turned off and that as a matter of fact the Pacific Fruit Express people were waiting for that man to turn up before the power was shut off (Tr. p. 134). LaVerl Johnson saw a Union Pacific maintenance truck alongside the substation (Tr. p. 215).

These facts in the record, together with the Appellant's Exhibit 26 and its various lease agreements, show positively a practice over a period of years whereby the Union Pacific Railroad Company sold, furnished and distributed electrical energy to the Pacific Fruit Express Company and undertook to and did repair and maintain the installations and appliances through which such electricity was served to the Pacific Fruit Express Company, including the substation where the energy was metered.

The Superintendent of the Pacific Fruit Express ice plant expressly testified there were no electricians on the payroll of the Pacific Fruit Express Company in November, 1950 (Tr. p. 300). An attempt has been made by Appellant to show that unqualified men changed the oil in the transformers of the Pacific Fruit Express Company. The reasonableness of that was for the jury. Expert testimony of Appellant's witness showed that that is work and a job for an electrician and a job that is not for a layman (Tr. p.

310). The Appellant is confronted with the necessity of admitting either that the proof as to work being done by laymen is not reasonable or that through Appellant's electricians it permitted this hazardous work to be done and knew it was being done by unqualified people, contrary to all the rules of safety.

The Appellant violated statutes in the State of Idaho relative to compliance with the National Electric Code, and the National Electric Code as we have heretofore discussed, provided for barriers and warning signs specifically, and was designed to protect life and property.

Idaho cases bearing on the question of concurrent negligence in point in this action are discussed.

In *McCarty v. Boise City Canal Company,* Idaho, 10 P. 623, it was held as early as 1886 that:

> "A person guilty of negligence cannot avoid responsibility therefor on the ground that others are also guilty of negligence contributing to the same injury."

Miller v. No. Pac. Railroad Co. Idaho, (1913) 135 P. 845, in defining proximate cause holds that where two independent causes concur in producing an injury so as to contribute to the plaintiff's damage that even though one is irresponsible in its origin the defendant Railroad Company would be held liable by reason of the fact that irresponsibility or concurring cause would not alone have been sufficient to produce the injury.

In *Idaho Gold Dredging Corp. v. Boise Payette Lumber*

Co. Idaho, 37 Pac. 2d 407, it was held:

> "Where damage has occurred while defendant's own wrongful act was in operation, he cannot set up as defense that there was a more immediate cause of loss if that cause was put into operation by his own wrongful act, and to entitle defendant to such exemption he must show, not only that same damage might have happened, but that it must have happened if his negligent act has not been committed."

Carron v. Guido, Idaho, 33 Pac. 2d 345, is, we believe, squarely in point on the proposition of law. This case has been reaffirmed by the Supreme Court of Idaho and is not in any way modified. The Court in this case reversed a judgment of nonsuit by the District Court. The action was one for injury to minors by reason of ammunition sold them contrary to law by the defendant's wife. The following quotation is from the Carron case:

> "The violation of a law, intended for the protection of a person and others like situated, which results in his injury and is the proximate cause of it, is negligence per se. Curoe v. Spokane & I. E. R Co. 32 Idaho, 643, 186 Pac. 1101, 37 A. L. R. 923; Smith v. Oregon Short Line R. Co. 32 Idaho, 695, 187 Pac. 539; Brixey v. Craig 49 Idaho 319, 288 Pac. 152."

The Appellant cites many cases on proximate cause and foreseeability, each of which we have carefully read and considered, but those cases are cases wherein the facts had nothing to do whatsoever with electrical energy, or they are cases wherein the facts showed there was no notice nor

knowledge chargeable to the defendant. We believe and most respectfully submit the law in this case as to the proximate cause is governed by the rule laid down by the Supreme Court of Idaho in *Chase v.. Washington Water Power Co.* 1941 62 Ida. 298, 111 Pac. 2d 872, wherein it said, at page 307:

> "In considering all of the facts shown by the evidence in this case, the question of whether the appellant was negligent and whether its negligence was the proximate cause of respondent's injuries, was not one of law for the court, but of fact for the jury, and the jury, having by its verdict, determined that question against the appellant, their finding should not be reversed."

In other words, the matter of proximate cause and questions connected therewith were properly submitted to the jury, the jury had the facts before it and as triers of the facts determined: First, that there was a duty on the part of the defendant railroad company as a distributor of electricity. Second, that the distribution of electricity and the manner in which it was done with the actual knowledge which the railroad company had or should have had of the hazardous conditions in the substation, were sufficient to pin-point the proximate cause in a causal line from the railroad company directly to the injury of LaVerl Johnson.

The *Restatement of Torts* is cited as to foreseeability. Section 435 of the *Restatement of Torts* reads:

> "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have seen the extent of

> the harm or the manner in which it occurred does not prevent him from being liable."

38 Am Jur Sec. 23, pages 665 and 666 read as follows:

> "Fundamentally the duty of a person's due care and his liability for negligence depends upon the tendency of his acts under the circumstances, as known or should be known to him. * * * The foregoing principals, which emphasize knowledge, actual or implied, as a foundation of a duty to use due care, are adhered to generally by the authorities."

The railroad company, as a distributor of electrical energy to the Pacific Fruit Express Company, for a valuable consideration, having knowledge that the Pacific Fruit Express Company had no qualified electricians and that the Pacific Fruit Express Company was letting unqualified men go into the substation, it became the duty of the Union Pacific Railroad Company to see that the conditions in the substation were corrected, or to cease furnishing energy. Its failure was the proximate cause of the injuries to LaVerl Johnson, and no amount of argument and no number of cases cited can change the facts and circumstances of the case. Each case is dependent upon its own peculiar circumstances and facts. Here the facts and circumstances are such that they fall squarely within the well known rules of proximate cause and fix liability on the Appellant. The test is reasonable foreseeability.

The Appellant relies upon certain Idaho cases and especially cites *Stearns v. Graves*, 62 Idaho 312, 111 Pac. 2d

882. The present case insofar as Idaho is concerned is governed by *Valles v. Union Pacific RR Co. et al,* 72 Idaho 231, 238 Pac. 2d 1154. This case refers to and distinguishes the Stearns case.

> "Reasonable foreseeability is the fundamental test of proximate cause and this rule is not changed by the existence of an intervening act or agency." *Phares v. Carr,* 106 N. E. 2d 242.

We believe that this is a fair and correct statement of the law.

Chatterton v. Pocatello Post, 70 Idaho 480, 223 Pac. 389 cited by Appellant was an action for injury to a minor, a newsboy who left an automobile driven by his superior and was injured crossing the street and one of the important principles laid down by the Court was that a defendant could not be liable when complying with the law. The defendant had parked its automobile in accordance with the State Traffic Law and the plaintiff contended that the automobile should have been parked on the opposite side of the street which would have been contrary to the law.

In the instant case the Appellant is in direct violation of law and can derive no comfort from the Chatterton case. Also in the Chatterton case, the Supreme Court of the State of Idaho was discussing the proposition that negligence that furnished the condition or occasion for an injury is not sufficient where that negligence does not put in motion the agency by which injuries are inflicted.

The Appellant did put in motion the agency, the elec-

tricity, which inflicted the injury to the plaintiff.

Stearns v. Graves 62 Idaho 312, 111 Pac. 2d 882, is a case where the doctrine of the last clear chance was involved. The opinion has to do with the particular facts in that case and we call the Court's attention again to *Valles v. U. P. RR Co. et al,* supra, where the Supreme Court of Idaho directly referred to Stearns v. Graves and pointed out that it was not inconsistent with the law as quoted in the Valles case and we submit that it cannot in any way be controlling in this instance.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A NEW TRIAL INASMUCH AS THE AMOUNT OF THE VERDICT WAS NOT GROSSLY EXCESSIVE OR MONSTROUS.

The Appellant spends much time in its brief, pages 49 to 57, attempting to demonstrate the monstrousness of the verdict and judgment in this case. The Appellant offered no evidence at trial relative to damages and did not argue the question to the jury. When the amount of the verdict was called to the attention of the trial Court on motion for new trial, the Court carefully considered the matter and then entered its order, (Tr. p. 31-35). The Trial Court in its order quoted from *Boice v. Bradley,* 92 Fed Supp 750, 194 Fed 2d 80, 198 Fed 2d 790, certiorari denied, 343 U. S. 941, 72 Sup. Ct. 1033. In quoting from the Boice case the Court quoted what it had to say in that case, and which was approved by the Circuit Court, and which thus becomes the

law in this district, as follows:

> "As a broad general rule, the damages must be reasonable whether merely actual damages or actual and exemplary damages. Unless the amount is so unconscionable as to impress the Court with the injustice of the award and thereby induce the Court to believe that the jury was actuated by passion, prejudice or partiality, there will usually be no interference with the jury's verdict. At the very threshold of this inquiry it must be remembered that the Constitution of the United States, Amendment 7, and of this State art. 1 Sec. 7, as well as all other States has secured the right of trial by jury in civil actions by the words 'shall be preserved' or, as stated in the Constitution of the State of Idaho, 'shall remain inviolate'. If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before the Court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the Court feels it is excessive, this Constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury".

In *Southern Pacific Co. v. Guthrie,* 9th Cir. 186 Fed 2d 926, this Honorable Court held that at most it could consider with respect to verdicts claimed to be excessive only whether the verdict is grossly excessive or monstrous. This rule is approved in *Bradley Mining Co. v. Boice,* 9th Cir. 194 Fed 2d 80.

The Guthrie case involved a man almost 59 years of age who had in an accident lost a leg severed between the knee and the hip for which a jury awarded $100,000.00

The Court was unwilling to determine that such damages were excessive or monstrous. Applying the same rule, how can it be said here that the verdict is monstrous or grossly excessive in view of the loss of two legs, just below the knee, the right arm at the shoulder, with the pain and suffering, shock, incompetency, mental attitude, number of amputations, future pain and suffering, and the continual expense, where the injured party was only 23 years of age, earning some $300.00 per month.

The decisions of this Court, as well as the Supreme Court of the United States relative to the granting of new trials for allegedly excessive verdicts, is too well established to require the citation of innumerable authorities relative to injuries of this type. We believe that the decision of the Trial Court on motion for new trial was correct and that the analysis of the factual situation here by the Trial Court with the application of the law by the Trial Court is a complete answer to the contentions of Appellant.

The Appellant seeks to minimize the suffering and the length of time that LaVerl Johnson was incapacitated, and seemingly predicts a bright future for him. In summarizing his mental condition from the Appellant's viewpoint, Appellant overlooks the important fact that Appellee was required to allege and prove that his mental condition and capacity was such that he was incompetent and under legal disability from the time of the accident until July 1, 1951. The proof in this respect (Tr. 43, 110) showed that this incompetency and disability lasted for a much longer time, and the Appellant, after hearing the testimony and being

convinced of the incompetency as a result of this accident, admitted the same and withdrew its denial thereto (Tr. 110-111).

We cite cases where comparable amounts have been awarded and approved for comparable injuries:

St. Louis SW Railroad Co. v. Ferguson, CCA 8th, 182 Fed. 2d 949, upholding a verdict of $150,000.00 for the loss of a leg, an arm and fingers.

Kieffer v. Blue Seal Chem. Co. CCA 3rd, 107 F. Supp. 288, 196 Fed. 2d 614, where $250,-000.00 was upheld for third degree facial burns, permanently disfigured face, blindness except for 25% vision in one eye.

Florida Power & Light Co. v. Robinson, 1954, 68 So. 2d 406, upholding $225,360.00 for serious back injuries and brain concussion.

It is to be noted that Appellant has cited at page 56 of its brief a case from Florida, but neglected to cite the later Florida case which we have just noted.

Devito v. United Air Lines, 98 Fed. Supp. 88, upheld a verdict of $160,000.00 for the death of a 38 year old businessman earning $9,000.00 in the year immediately prior to his death.

LaVerl Johnson has a life expectancy of approximately 40 years, and the injuries and his pain and suffering and the future which he faces are clear. Based upon the law and the facts we believe it is clear that the verdict and the judgment are proper and that the Trial Court did not abuse its judicial

discretion in refusing to find the verdict excessive.

E. ALLEGED ERRORS IN ADMISSION OF TESTIMONY OF ELMER V. SMITH.

Appellant, at pages 57 and 58 of its brief, cites from Jones on Evidence. Actually the citation, as well as the quotation given, fails to include the exceptions to the general rule and the exceptions were found on the next page, or at page 700. The rule on exceptions to the general rule, 2 Jones on *Evidence,* 4th Ed. page 700 is as follows:

> "Exceptions to the general rule—While the authorities are generally agreed that an expert witness may not be called upon to decide ultimate issues or pass upon contraverted questions of fact, there is some confusion and apparent conflict among the courts as to the application of the rule. An examination of the decisions discloses many instances in which courts, without specifically repudiating the rule, have departed from it by permitting an expert to testify directly as to an ultimate issue, or to express an opinion as to the merits of the controversy."

The Appellants have also indicated that the law is all "one way on the subject," page 57 of their brief. The law in Idaho is not as is cited by Appellant. We briefly review the Idaho law:

Knauff v. Dover Lbr. Co. 20 Idaho 773, 120 Pac. 157, is a case in which an expert witness was asked: "What is the proper method of construction in the slasher with reference to the hole about the chain where the chain goes down

through the floor?" In this case it was argued that the question called for an opinion of the witness upon an issue which should have been left to and was to be determined by the jury. The Court said at page 789 of the Idaho Reports:

> "In the present case the question as to the negligence of the defendant in permitting the hole to be in the condition it was, and permitting it to so remain was for the jury to determine, and the jury might be very much aided in determining this question by the evidence that it was maintained in such a manner as to show negligence on the part of the appellant, or where the facts were such as to require of the respondent that he should expect and look for defects in the construction, condition and operation of the chains to this hole. This would not necessarily be a matter of common knowledge but would be the statements and experience of men familiar with the subject and might be a very great aid to the jury, notwithstanding the fact that the very question which the witness expresses an opinion upon is a question which the jury must pass upon; and in such cases the fact that the witness expresses an opinion upon a matter not of common knowledge in giving his testimony, is not reversible error."

The Trial Judge was following the Idaho law and stated in effect the same rule as set forth in the Knauff case heretofore quoted, by saying: (Tr. p. 193)

> "I take it the only way the jury or the court or anyone else could get any information on this matter is from the opinion of experts. There would have to be some foundation for the jury to pass upon the question that would be submitted to them. The only way I know of that they could get that information would

be from physical conditions and from the opinions of experts. This man is qualified as an expert.

* * * * *

I will let him answer."

Further, the Idaho case of Cochran v. Gritman, 1921, 34 Idaho 654, 203 Pac. 289, was cited with approval by the Supreme Court of the United States in *Eastern Transportation Line v. Hope,* 95 U. S. 297, 24 Law Ed. 477, in which it was stated:

> "It is permitted to ask questions of the witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked questions involving the points to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects upon which the jury are not as well able to judge for themselves as the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases."

The case of *Hayhurst v. Boyd Hospital,* 1927, 43 Idaho 661 is also authority for the above rule.

In addition to these matters the Appellant absolutely waived any possible error on this question, which error we do not at all concede, when it went on and did not renew its objection on other testimony given by the witness Smith, and when it cross-examined Smith regarding all of these matters. Furthermore, the portion of the record set out by

the Appellant in its brief as to the testimony to which it objects, Page 15, of their brief shows positively that the witness was not testifying to the duty but was testifying to the practice. The witness stated as follows:

> "* * * in my observation over previous years the power company and other distributors of electricity will not, knowingly, and if it is within their knowledge, deliver electricity to hazardous installations. * * *"

The Court carefully instructed the jury as to the weight to be given the testimony of opinion witnesses. That instruction appears at Tr. 376-377. Appellant in no way excepted to that instruction and did not in its brief and cannot now point out any prejudicial error from the admission of the testimony of the witness Smith.

F. ALLEGED ERRORS IN INSTRUCTIONS

Appellant in its specifications of errors, IV to XI inclusive, requests this Court to review instructions given and requested. In doing so, reference is made to the Motion for new trial, as well as the Motion for Judgment notwithstanding the verdict for the reasons alleged as error. As we understand the law in Federal Court, and in this circuit, the Appellant cannot appeal from the Order denying the Motion for new trial, or from the Order denying Motion for Judgment notwithstanding the verdict as to these matters. Its appeal is from the verdict and judgment in the trial Court, and not from any rulings on such Motion.

In *Armstrong vs. New La Paz Gold Mining Company*, 1939 CCA 9th, 107 Fed. 2d 453, the 2nd headnote reads:

> "The Circuit Court of appeals would only notice appeal from judgment and not appeal from Order denying Defendant's Motion for a new trial."

Ford Motor Company v. Motor Sales, 1950, CCA 6th, 185 Fed. 2d 531 was an appeal from the judgment notwithstanding the verdict and the appeal was dismissed. The Court at page 533, said:

> "It is likewise well settled that no appeal will lie from an Order overruling a Motion for a new trial (cases cited).
>
> "Appeals may follow in time the entry of such on Order, but such an appeal is properly taken from the judgment previously entered rather than from the order which refused to set it aside."

At page 534 this was said:

> "Applying the same general rule, it follows that an appeal may follow in time after the entry of an order sustaining a motion for the entry of judgment notwithstanding the verdict. The appeal is not taken from the order sustaining the motion, but from the judgment thereafter entered which disposes of the case. It also logically follows that an appeal may follow in time after an order overruling a motion for judgment notwithstanding the verdict. The appeal is not taken from the order overruling the motion, but from the judgment previously entered which the order did not set aside."

The challenge to the Instructions is also of no merit whatsoever for two separate and distinct reasons: 1. If error did, in fact, exist in the challenged or refused instructions, that error was absolutely waived by the Appellant, and 2. The challenged instructions as given, were correct, and they properly set forth the law; those instructions purportedly tendered by the Appellant, were properly refused.

1. Waver of objections:

At the conclusion of the Court's oral instructions to the Jury (Tr. p. 382), the Court in the absence of the jury, inquired of counsel whether they wished to register any exceptions to the record as to instructions. Thereupon, Mr. Anderson, counsel for the Appellant, interposed a number of objections (Tr. p. 382-386). After the Court had listened to the objections made, the Court recalled the Jury, and then gave additional instructions (Tr. p. 386-387). The jury was then excused again, and the Court asked (Tr. p. 387):

> The Court: Does the plaintiff feel that I have covered the matter?
>
> Mr. Davis: Yes, your Honor.
>
> The Court: Do you have any further objection?
>
> Mr. Anderson: I have no further objections.
>
> The Court: You feel that I have fully covered the matter; if you don't, then I will call them back.
>
> Mr. Anderson: I didn't feel or rather it didn't seem to me that it had been covered when your Honor told them they should not tie the Pacific Fruit Ex-

press into this.

The Court: I also told them that in any action such as their pulling the switches or anything of that nature that the Union Pacific should not be held responsible for any of their acts.

Mr. Anderson: I think it is all right.

The Court: You are satisfied.

Mr. Anderson: Yes.

The Court: Mr. Bailiff, you may recall the jury.

(The following in the presence of the jury.)

The Court: The alternate jurors may be excused at this time and I want to thank you for the attention you have paid here, and for helping us out by standing by. The bailiffs will be sworn.

(Whereupon, the bailiffs were sworn by the clerk.)

The Court: The jury may now retire to consider their verdict.

The record points up two separate reasons for the Appellees' position that the Appellant has waived the right to objection. First, counsel failed to object to the instructions of the Court, as corrected, and secondly, the instructions as corrected, were absolutely approved by the Appellant; consequently, all objections were waived.

Rule 51 of the *Federal Rules of Civil Procedure,* provide as follows:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. * * *"

The underlying principle for the status of the law is that the trial Judge is entitled to be informed of possible errors, and given an opportunity, if necessary, to correct them. Williams vs. Powers, 1943, 135 Fed. 2d 153, CA 6th. The authorities on this aspect of our argument are numerous. *Boise Payette Lumber Company vs. Larson,* 1954, CA 9th, 214 Fed. 2d 373; *LeVine vs. Joseph E. Seagram & Sons, Inc.,* 1946, CA 7th, 10 Fed. Rules Service, 51.21, Case 1, 158 Fed. 2d 55.

An examination of the record after the Court corrected the charge, in accordance with the Appellant's request, conclusively illustrates that it made no further objection of any nature. It may not now complain of any prejudice. The mere fact that the Appellant had submitted requests for instructions which the Court denied, does not alter or otherwise abrogate the requirements of Rule 51. Blair vs. Cullom, 168 Fed. 2d 622, in which the Rule is stated as follows:

> "It seems clear that Rule 51 applies and requires objections to those parts of the charge claimed to be erroneous, whether or not requests of charge have been submitted (citing cases). The fact that here they were submitted before trial rather than during it we think immaterial; as we have said before, objection must be taken 'in order * * * that the judge may clarify or correct his statement before the jury retires'."

Not only did counsel fail to object as is required by Rule 51, but we further contend that the record, as reproduced above, shows a consent to the instructions as given.

A clear pronouncement of the applicable Rule is contained in *Wood vs. Sexton Company,* 275 Fed. 660, CCA 3rd.

In *Boise Payette Lumber Company vs. Larson,* 214 Fed. 2d. 373, this Court said:

> "* * * counsel subjectively may have had reservations about the instructions, yet, tested objectively, there is much validity to the proposition of Plaintiff that the Defendant consented to the instructions as given."

2. Instructions as given correctly stated the law:

The argument of Appellant as to the instructions given the jury, which Appellant specifies as error is contained at pages 60-64 of its Brief. The challenge to the correctness of those instructions is upon the theory that there was no evidence that there was anything defective in the equipment or appliances in or about the sub-station. We believe that we have fully answered this contention in our argument contained at pages 10 to 44 of this Brief. We there point out that the law is that when a defective or hazardous or dangerous or perilous condition exists of which the one furnishing electric energy has notice, even though those conditions exist on the premises of another, and in equipment of another, that the duty of the one furnishing electricity is to require the correction of conditions or refuse to furnish elec-

trical energy into such equipment. The play on words as to the term "defect" and as to the term "hazardous" or perilous" or "dangerous" is without any merit.

Appellant strenuously contends on page 60 of its Brief that the Court erred in instructing the Jury with reference to defective equipment, when there was no evidence as to defects.

The Court's instruction using the word "defects" and "defective" does not at all bear out the construction placed upon the same by Appellant. The particular instruction is found on page 374, Transcript. It shows that the Court merely gave to the jury a general rule of law with reference to the duty of one supplying electricity.

This instruction was clearly a guide to the jury, and not only was not unfavorable to Appellant, but if there were no defects, could not possibly prejudice them.

On page 377 of the Transcript, the Court instructed the jury as to what would amount to negligence on the part of Appellant, and it will be noted that the jury were specifically advised that:

> "* * * and you further find that such conditions were dangerous or hazardous to life and property, and that the Union Pacific Railroad Company continued to furnish high voltage electricity through said lines and into said sub-station, and that as a proximate cause thereof, LaVerl Johnson was injured, then the defendant was negligent."

The Appellant cannot point up anything in the instructions or any portion of any instruction that in any way advises

the jury that the Appellant could be found negligent by reason of any "defective" condition, and assuming but not admitting that the Appellant is correct in its definition and interpretation of "defective" it has no complaint whatever, either from a legal or a practical standpoint with the instructions on the subject.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that no prejudicial error appears in the Record; that the verdict of the jury and the judgment entered thereon by the Court were in every respect in accordance with the law and the facts established and that accordingly, we respectfully pray that said judgment be, in all respects affirmed.

Respectfully submitted,

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